Megat Najmuddin bin Megat Khas & Ors v Perwira Habib Bank Malaysia Berhad

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–273–1999

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD, ABDUL AZIZ JJCA

25 JULY 2003

Land Law *— Lien — Creation — Lien holders' caveat — Deposit of title with bank — Intending purchaser deposited title with bank — Purchase subject to consent of State Authority — Whether purchaser could consent to creation of a lien over the land — Lien holders' caveat lodged over the land — Whether such a lien holders' caveat valid — National Land Code s 281*

Legal Profession *— Duty of care — Negligence — Solicitors advised that a lien holders' caveat would be sufficient security for a loan — Caveat held invalid for want of consent of registered proprietor — Whether solicitors ought to be held liable for loss*

The appellants were practising solicitors. The respondents, a local bank, had engaged the services of the solicitors to arrange for the execution, by Messrs Loo & Sons Realty Sdn Bhd, the registered owner of a piece of land ('the landowner'), of a third party first legal charge over the land, as security for an overdraft facility for RM700,000 ('the first OD') granted by the bank to one MAA Holdings Sdn Bhd ('the borrower'). In the meantime, the landowner had entered into a sale and purchase agreement ('the SPA') to sell the land to Land Holdings Sdn Bhd ('the purchaser'). The original title deed to the land had been handed over by the landowner to the purchaser. The letter of offer from the bank to the borrower in respect of the first OD, together with the title which had been deposited by the purchaser with the bank, was given by the bank to the solicitors for the purpose of the engagement. The land was, however, subject to a restriction-in-interest which prohibited any transfer or the creation of any lease or security on the land without the approval of the State Authority. Since it would take time to obtain the consent from the State Authority, the borrower proposed the creation of a lien-holder's caveat ('LHC') on the land. This proposal caused the solicitors to issue four different letters to the bank. The first letter contained the solicitors' advice that a LHC would be sufficient security for the disbursement of the first OD. Even before the advice was given, the bank released the sum of RM200,000 to the borrower without any security whatsoever. The second letter informed the bank that the solicitors had duly perfected the security over the land, by way of the LHC, for the first OD and the borrower could be allowed to utilize the facility. The borrower then needed a further overdraft facility of RM500,000. The bank instructed the solicitors to create a fresh LHC for the total sum of RM1.2m. By the third letter the solicitors advised that, since the earlier LHC did not stipulate a named sum, that LHC was sufficient to secure the extra RM500,000 ('the second OD'). In the fourth letter the solicitors advised the bank to withdraw the LHC and to lodge a fresh LHC to enable the transfer of the land from the landowner to the purchaser. Meanwhile, under the SPA, the balance of the purchase price was to be paid by the purchaser to the landowner within four months from the date of the SPA, ie by July 1984, subject to the consent for the transfer and charge over the land being obtained. The consent to transfer was not obtained until January 1988, by which time the SPA had been determined. The bank commenced legal action to enforce the LHC against the landowner and the purchaser. The LHC was held to be invalid for failure to comply with the requirements for its creation under s 281(1) of the National Land Code ('the NLC') which provided that only the registered proprietor of a land had the power or right to deposit the title for the purpose of creating a lien. The title in this case had been 'deposited' by the purchaser while the landowner was still the registered proprietor (see *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd dan satu lagi (No 1)* [1996] 3 MLJ 409). The bank then sued the solicitors for breach of contract and negligence. The learned trial judge gave judgment for the bank in the sum of RM3.3m with interest at 8%pa. The solicitors appealed. Learned counsel for the solicitors argued that the bank did not ask for advice and consequently could not have relied on the advice of the solicitors. The bank had never asked for specific advice in writing from the solicitors. The solicitors had merely responded to the borrower's urgent request for the use of the first OD and the proposal to create a LHC over the land as reflected in the borrower's letter to the bank. Counsel for the solicitors also argued that the failure in enforcing the LHC was not as a result of the solicitors' alleged negligence. If the bank felt that the creation of a LHC was insufficient to protect its interest, it ought to have asked for additional securities or rejected the loan outright. By failing to do so, the bank was in error. Further, the finding on negligence went against the grain of the authorities. The solicitors had qualified their advice by stating that a LHC would only be sufficient security at that point in time, pending the consent being obtained, and that the solicitors had declined to make any representation as to the consent and the bank did not seek any clarification or detailed advice from the solicitors on this.

Held, dismissing the appeal with costs:

(1) The fact that the bank never asked for specific advice in writing from the solicitors did not absolve the solicitors from liability for the negligent advice. The learned judge had found and concluded that the instructing letter from the bank to the solicitors was very clear. The bank wanted a third party first legal charge on the land. However, on the borrower's request for a LHC, the solicitors volunteered the advice that a LHC would be sufficient security. The learned judge was correct in his findings and conclusion. In respect of the earlier release of RM200,000, the trial judge, from his finding of facts, concluded that the solicitors ought not to be

liable for that sum. Although the learned judge did not place any emphasis on the real question of legal causation, the CA was satisfied, on the facts, that the advice of the solicitors, that the LHC would be sufficient security, was the cause of the bank disbursing the balance of the first OD, and subsequently the whole of the second OD, to the borrower, to its detriment. There was an absence of causation only in respect of the first RM200,000 because the solicitors' advice was not the cause of its release. (see pp 75D–F, 76A–B).

(2) By the expression 'for some other purpose' the learned judge was referring to the purpose of executing a third party first legal charge on the land, for which the Title had been deposited by the purchaser with the bank. Though this may be good for that purpose, under s 281(1) of the NLC, the right to grant a LHC over land belongs only to the registered proprietor or registered lessee of the land. Although the section did not distinguish between the forms of security, the facts as to who deposited the Title with the bank and who consented to the creation of the LHC were, for the purpose of the section, material in deciding whether or not the LHC was valid. Despite the fact that the bank did not ask for additional securities or reject the loan outright, the solicitors could not escape liability for the negligent advice on which the bank had relied and acted to its detriment. (see p 78C–F).

(3) In the face of the specific instruction from the bank to the solicitors for the creation of a third party first legal charge in its favour and with the knowledge that consent had not been obtained at that point of time, the solicitors in their first letter advised the bank that a LHC would be in order and would be sufficient security for the disbursement of the funds. This was followed by their second letter advising the bank to allow the borrower to utilize the first OD in the mistaken belief that they had secured a proper LHC. Before giving the advice, the solicitors had failed to check with the landowner, of whom the solicitors were aware, for confirmation that the landowner had, indeed, deposited the title and that it had no objections to the LHC being created. It could not be said that the bank had represented to the solicitors that the title had been deposited with the bank by the landowner. Even if such a representation had been made, and in view of the nature of their profession, the solicitors ought not to have presumed that the landowner had given its consent for the creation of the LHC on the land. *Brisol & West Building Society v Mothew* (1966) 4 All ER 698 (folld). (see p 80A–E).

[Bahasa Malaysia summary

Perayu-perayu beramal sebagai peguamcara. Responden, sebuah bank tempatan, telah menggunakan khidmat peguamcara tersebut

untuk menguruskan perlaksanaan, oleh Tetuan Loo & Sons Realty Sdn Bhd, tuanpunya berdaftar sekeping tanah ('pemunya tanah'), suatu gadaian pertama sah pihak ketiga ke atas tanah tersebut, sebagai cagaran bagi kemudahan overdraf sebanyak RM700,000 ('OD pertama') yang diluluskan oleh bank tersebut kepada MAA Holdings Sdn Bhd ('peminjam'). Dalam pada itu, pemunya tanah telah memasuki suatu perjanjian jual beli ('PJB') supaya menjual tanah tersebut kepada Land Holdings Sdn Bhd ('pembeli'). Salinan asal geran tanah tersebut telah diserahkan oleh pemunya tanah kepada pembeli. Surat tawaran pinjaman dari bank kepada peminjam berkenaan OD pertama, bersama-sama dengan geran tanah tersebut yang diletakkan oleh pembeli dengan bank, telah diserahkan oleh bank kepada peguamcara tersebut bagi tujuan khidmatan tersebut. Walau bagaimanapun, tanah tersebut tertakluk kepada suatu sekatan hak yang melarang sebarang pindahmilik tanah atau pembentukan sebarang pajakan atau sekruiti ke atas tanah tersebut tanpa kelulusan Pihak Berkuasa Negeri. Memandangkan permohonan mendapatkan kebenaran akan memakan masa, peminjam mengesyorkan pembentukan suatu kaveat pemegang lien ('KPL') ke atas tanah tersebut. Syor ini menyebabkan peguamcara tersebut mengeluarkan empat pucuk surat berlainan kepada bank. Surat pertama mengandungi nasihat peguamcara tersebut bahawa suatu KPL merupakan cagaran yang memadai bagi pengeluaran OD pertama. Malah, sebelum nasihat ini diberikan, bank telah melepaskan sejumlah RM200,000 kepada peminjam tanpa sebarang sekuriti. Surat kedua memberitahu bank bahawa peguamcara tersebut telah menyempurnakan securiti ke atas tanah tersebut, secara KPL, bagi OD pertama dan peminjam boleh dibenarkan menggunakan kemudahan tersebut. Peminjam kemudian berkehendaki kemudahan overdraf seterusnya sebanyak RM500,000. Pihak bank telah mengarahkan peguamcara tersebut menyediakan KPL yang baru bagi jumlah RM1.2j. Melalui surat ketiga peguamcara tersebut menasihatkan bahawa, memandangkan yang KPL sebelumnya tidak menyentuh jumlah yang dipinjamkan, maka KPL tersebut adalah cagaran yang memadai bagi RM500,000 tambahan ('OD kedua'). Dalam surat keempat peguamcara tersebut menasihatkan bank menarik balik KPL tersebut dan memasuki suatu KPL baru bagi membolehkan pindahmilik tanah dari pemunya tanah kepada. Dalam pada itu, di bawah PJB, baki harga belian perlu di bayar oleh pembeli kepada pemunya tanah dalam masa empat bulan dari tarikh PJB, iaitu sebelum Julai 1984, tertakluk kepada kebenaran bagi pindahmilik dan gadaian ke atas tanah tersebut diperolehi. Kebenaran bagi pindahmilik tidak diperolehi sehingga Januari 1988, dan PJB pada masa tersebut telah ditamatkan. Bank memulakan guaman ke atas KPL terhadap pemunya tanah dan pembeli. KPL tersebut didapati tidak sah kerana kegagalan mematuhi peruntukan kewujudannya di bawah s 281(1) Kanun Tanah Negara ('KTN') yang memperuntukkan bahawa hanya seorang tuanpunya berdaftar mempunyai kuasa atau hak meletakkan sesuatu geran tanah bagi maksud kewujudan sesuatu lien. Geran tanah dalan kes ini telah 'diletakkan' oleh pembeli, malahan pemunya tanah masih menjadi tuanpunya berdaftar (lihat *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 1)* [1996] 3 MLJ 409). Bank telah menyaman peguamcara tersebut bagi kemungkiran kontrak dan kecuaian. Hakim perbicaraan yang bijaksana telah merekodkan penghakiman bagi pihak bank bagi jumlah RM3.3j dengan faedah pada kadar 8% setahun dari tarikah penghakiman. Peguamcara tersebut telah merayu. Peguam bagi peguamcara tersebut berhujah bahawa bank tidak pernah meminta nasihat maka tidak mungkin telah bergantung kepada nasihat peguamcara tersebut. Bank tidak pernah meminta nasihat khas bertulis dari peguamcara tersebut. Peguamcara tersebut hanya telah membalas permintaan segara peminjam bagi kegunaan kemudahan OD pertama dan syor bagi pembentukan suatu KPL ke atas tanah tersebut seperti dinyatakan dalam surat peminjam kepada bank. Peguam bagi pihak peguamcara tersebut juga berhujah bahawa kegagalan menguatkuasakan KPL bukannya akibat kecuaian peguamcara tersebut. Sekiranya pihak bank mendapati pembentukan suatu KPL tidak mencukupi bagi melindungi kepentingannya, pihak bank harus meminta cagaran tambahan atau menolak pinjaman tersebut. Akibat kegagalannya berbuat demikian, bank telah melakukan kesilapan. Seterusnya, penemuan kecuaian tersebut melanggar aliran autoriti. Peguamcara tersebut telah mensyaratkan nasihat mereka dengan pernyataan bahawa sesuatu KPL hanya cagaran yang memadai buat masa itu, selagi kebenaran belum diperolehi, dan peguamcara tersebut enggan membuat sebarang representasi ke atas kebenaran tersebut dan pihak bank tidak pernah meminta sebarang penjelasan atau nasihat terperinci dari peguamcara tersebut berkaitannya.

Diputuskan, menolak rayuan dengan kos:

(1) Fakta bahawa pihak bank tidak pernah meminta nasihat khas bertulis dari peguamcara tersebut tidak membebaskan peguamcara tersebut dari liabiliti kerana memberi nasihat dengan cuai. Hakim yang bijaksana mendapati dan memutuskan bahawa surat arahan dari bank kepada peguamcara tersebut adalah sangat jelas. Bank menghendaki suatu gadaian pertama pihak ketiga ke atas tanah tersebut. Walau bagaimanapun, di atas permintaan peminjam bagi suatu KPL, peguamcara tersebut telah secara rela menawarkan nasihat bahawa suatu KPL merupakan cagaran yang memadai. Hakim yang bijaksana adalah betul dalam penemuan dan keputusannya. Berkenaan dengan perlepasan jumlah RM200,000, hakim perbicaraan, berasaskan pendapat faktanya, memutuskan bahawa peguamcara tersebut tidak harus didapati bertanggungjawab bagi jumlah tersebut. Walaupun hakim yang bijaksana tidak menitikberatkan persoalan sebenarnya punca sebab dari segi undang-undang, MR berpuashati, berasaskan

fakta, nasihat peguamcara tersebut, bahawa KPL merupakan cagaran yang memadai, adalah pendorong bank melepaskan baki OD pertama, dan seterusnya keseluruhan OD kedua kepada peminjam, dan mengalami kerugian. Hanya terdapat ketidakhadiran pendorong ini bagi jumlah RM200,000 memandangkan yang nasihat peguamcara tersebut bukan punca perlepasannya (lihat ms 75D–F, 76A–B).

(2) Dengan penggunaan pepatah 'bagi sesuatu sebab lain', hakim yang bijaksana sedang merujuk kepada tujuan penyempurnaan gadaian pertama pihak ketiga ke atas tanah tersebut, yang menjadi tujuan pembeli memperletakkan geran tanah tersebut dengan bank. Walaupun ini memadai bagi tujuan tersebut, di bawah s 281(1) KTN, hak memberikan suatu KPL ke atas tanah hanya kepunyaan tuanpunya berdaftar atau pemegang pajakan berdaftar tanah tersebut. Walaupun seksyen tersebut tidak membezakan antara bentuk sekuriti, fakta-fakta siapakah yang meletakkan geran tanah dengan bank dan siapakah memberi kebenaran pembentukan KPL tersebut adalah, bagi maksud seksyen ini, material dalam mengenalpasti keesahan KPL tersebut. Walaupun pihak bank tidak meminta sebarang cagaran tambahan atau menolak pinjaman tersebut, peguamcara tersebut tidak dapat melepaskan liabiliti bagi nasihat yang cuai yang bank telah bergantung kepada dan bertindak ke atas dan menanggung kerugian. (lihat ms 78C–F).

(3) Memandangkan arahan khas pihak bank kepada peguamcara tersebut bagi pembentukan suatu gadaian pertama pihak ketiga di atas nama bank dan dengan kesedaran bahawa kebenaran masih belum diperolehi pada masa itu, peguamcara tersebut dalam surat pertama mereka telah menasihatkan bank bahawa suatu KPL adalah sah dan memadai bagi pengeluaran pinjaman. Ini diikuti surat kedua menasihatkan bank membenarkan Peminjam menggunakan OD pertama di atas salah sangka mereka bahawa suatu KPL yang sah telah diperolehi. Sebelum memberikan nasihat tersebut, peguamcara tersebut telah gagal mengenalpasti dari pemunya tanah, yang peguamcara tersebut sedar, bagi mengesahkan bahawa pemunya tanah memang telah had meletakkan garan tanah tersebut dan tiada sebarang bantahan kepada KPL dibentukkan. Tidak dapat dikatakan bahawa pihak bank telah membuat representasi kepada peguamcara tersebut bahawa geran tanah tersebut telah diletakkan dengan bank oleh pemunya tanah. Jikapun representasi sebegitu telah dibuat, dan memandangkan sifat profesion mereka, peguamcara tersebut harus tidak membuat andaian bahawa pemunya tanah telah memberikan kebenarannya bagi pembentukan suatu KPL ke atas tanah tersebut (lihat ms 80A–E); *Brisol & West Building Society v Mothew* [1966] 4 All ER 698 diikut.]

Notes

For cases on negligence of solicitors, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1585–1596.

For cases on the creation of liens, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2712–2724.

Cases referred to

Brisol & West Building Society v Mothew [1966] 4 All ER 698 (folld)
Midland Bank v Hett, Stubbs & Kemp (a firm) [1979] ChD 384 (refd)
Mohamed Ali v PP [1962] MLJ 230 (refd)
Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 1) [1996] 3 MLJ 409 (folld)

Legislation referred to

Evidence Act 1950 ss 45, 114(g)
National Land Code ss 281(1)
Rules of the High Court 1980 O 40 r 1(1)

Appeal from: Civil Suit No S2–22–550 of 1990 (High Court, Kuala Lumpur)

Manjit Singh (*Balvinder Singh Henth* with him) (*Sri Ram & Co*) for the appellants.

WM Lee (*GL Oh* with her) (*Shook Lin & Bok*) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): The appellants appealed against the decision of the learned judge who gave judgment for the respondent with costs against them in the sum of RM3.3m with interest at 8%pa from the date of judgment for breach of contract and negligence.

2 To summarize the facts:

(1) The appellants were partners in the firm of solicitors known as Megat Najmuddin Leong & Co. On 23 August 1984, the respondent, a local bank, engaged the appellants to arrange for one Messrs Loo & Sons Realty Sdn Bhd, the registered owner ('the owner') of a piece of land ('the land'), to execute in its favour a third party first legal charge for RM700,000 over the land in respect of an overdraft facility of that amount ('the first OD') granted by it to one MAA Holdings Sdn Bhd ('the borrower').

(2) In the meantime, the owner had entered into a sale and purchase agreement on 16 December 1983 ('the SPA') to sell the land to one Land Holdings Sdn Bhd ('the purchaser'). The original title deed to the land ('the title') was handed over by the owner to the purchaser. The land was subject to a restriction-in-interest term which prohibits any transfer, creation of a lease or any security without the approval of the State Authority.

(3) The letter of offer in respect of the first OD dated 17 August 1984 contained a term that the utilization of the overdraft facility may be allowed only after the execution of all security documents and presentation of the charge for registration. A copy of the letter of offer and the title which was deposited by the purchaser with the respondent, were given to the appellants by the respondent for the purpose of the engagement.

(4) The borrower was in need of urgent cash. Since it would take some time to obtain the consent from the State Authority, the borrower proposed to the respondent the creation of a lien-holder's caveat ('LHC') on the land. The proposal triggered the appellants to issue four different letters to the respondent, on which the respondent based its claim for negligent advice. The first letter dated 4 September 1984 (Rekod Rayuan Jilid II at p 354) contained the appellants' advice that a LHC would be sufficient security for the disbursement of the first OD at that point of time. However, from the record, even before the advice was given the respondent had allowed for the release of a sum of RM200,000 to the borrower without any security whatsoever. The second letter dated 20 September 1984 (Rekod Rayuan Jilid II at p 361) contained the appellants' advice that the appellants had duly perfected the security of the LHC over the land for the first OD and as such the borrower could be allowed to utilize the facility. The respondent relied and acted on it. The borrower needed a further overdraft facility of RM500,000. Then, the respondent instructed the appellants to create a fresh LHC for the total sum of RM1.2m. By the third letter dated 17 December 1984 (Rekod Rayuan Jilid II at p 365) the appellants advised that since the earlier LHC did not stipulate a named sum, that LHC was sufficient to secure the extra RM500,000 ('the second OD'). The respondent also relied and acted on it. In the fourth letter dated 24 March 1988 (Rekod Rayuan Jilid II at p 394) the appellants advised the respondent to withdraw the LHC and to lodge a fresh LHC to enable the transfer of the land from the owner to the purchaser. By this time, the borrower had already defaulted in the repayment of the first OD and the second OD.

(5) Under the SPA, the balance of the purchase price shall be paid by the purchaser not later than four months from the date of the agreement (16 December 1983) subject to the consent of the State Authority having been obtained for the transfer and to create a charge over the land (cl 2). In the event, the consent not having been obtained within the stipulated period, then the time for payment of the balance of the purchase price shall be extended by a further two months (from 15 April 1984 to 15 June 1984). If the consent is still not obtained, the agreement shall determine and all payments made shall be refunded by the vendor to the purchaser and thereafter neither parties shall have any claim against the other except for antecedent breaches (cl 2(a)). By the target date, the consent had not been obtained. The full purchase price was paid on 6 July 1984. The consent of the State Authority for the transfer of the land was obtained only on 25 January

1988, by which time the agreement had been determined. The title shows that the transfer, which was effected on 22 July 1988, had been cancelled subsequently.

(6) The respondent commenced legal action to enforce the LHC against the owner and the purchaser in OS No S6–24–1278–1990 in Kuala Lumpur High Court. The High Court and the Court of Appeal held that the LHC was invalid for not having complied with the requirements for its creation under the provisions of s 281(1) of the National Land Code ('the NLC') (see Rekod Rayuan Jilid II at pp 465–490; *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & Satu Lagi (No 1)* [1996] 3 MLJ 409).

3 The learned trial judge made the following findings of facts and conclusions:

(1) The earlier disbursement of the temporary overdraft facility of RM200,000 by the respondent to the borrower was to be treated as a separate facility on a clean basis and only to be a part of the first OD if the charge was perfected as the facility was granted before the matter was referred to the appellants. Therefore, the appellants were not liable for this sum.

(2) In its letter of 23 August 1984 (Rekod Rayuan Jilid II at p 351), the respondent gave specific instructions to the appellants to arrange for the owner to execute in its favour a third party first legal charge over the land for the first OD. All the parties were aware of the restriction-in-interest clause in the title, and the consent of the State Authority for the transfer of the land had not been obtained at the time when the appellants preferred the advice in their first letter. The letter, apart from the impropriety or otherwise of the advice contained therein, also had a material factual error which stated that the property to be charged had been purchased by the borrowers, which was not true.

(3) The appellants could have written to the owner for its confirmation that it had indeed deposited the title and that it had no objection to a LHC being created, which was not done by the appellants. Further, in the mistaken belief that they had secured a proper LHC, the appellants wrote the second letter advising the respondent to allow the borrower to utilize the first OD when they well knew that the State Authority had not given the consent. The respondent acted on the advice to its detriment. And on the basis of the decision of the Court of Appeal in *Perwira Habib Bank* and the law as laid out in s 281 of the NLC and in the light of the admissions made by the second appellant in his evidence, especially as to his knowledge on the requirements for the creation of a LHC, the learned judge concluded that the appellants were liable in negligence to the respondent for the loss suffered in respect of the first OD.

(4) The third letter contained advice relating to the LHC which was held to be invalid. In any case, the second appellant's admission that by this letter the appellants were indeed advising the respondent that the

respondent was properly secured for the facility of RM1.2m to the borrower by way of the LHC is an unequivocal admission of negligence based on the fact that the LHC had been proven to be no security at all. Since the respondent had relied and acted on the letter to its detriment in respect of the second OD, the learned judge concluded that the appellants were also liable in negligence to the respondent for that sum.

(5) The fourth letter contained advice to the effect that the duly stamped transfer was in the appellants' possession for the said transfer of the land and that the appellants were in the process of registering the same with the land office, and also an advice to withdraw the LHC and to lodge a fresh LHC. Such advice was not proper because: (i) the appellants had not obtained the Board's resolution from the owner with regard to its consent to enter a LHC to secure the facilities granted to the borrower; (ii) the possibility of either the owner or the purchaser giving the consent to create a LHC would seem a far-fetched possibility since at that point of time the borrower had already defaulted in the repayment of the first OD and the second OD; and (iii) as the SPA had already been determined by reason of the failure to obtain the consent of the State Authority for the transfer within the time stipulated in the SPA, it would be highly unlikely for the owner to commit its land to a LHC over the land. However, the negligent advice might seem of no consequence since the LHC was itself invalid.

4(1) Before us, Mr Manjit Singh for the appellants argued the appeal based on the memorandum of appeal which was categorized under the following topics:

A The respondent did not ask for advice and consequently could not have relied on the advice of the appellants (grounds 3, 4, 5, 6 and 8).

B The failure in enforcing the LHC was not a result of the appellants' alleged negligence (grounds 10, 11 and 12).

C The appellants' advice was not negligent (grounds 1, 2, 7, 9, 15 and 16).

D The expert evidence applied by the High Court (grounds 13 and 14).

E Damages (grounds 17 and 18).

(2) (a) Under topic A, the learned counsel submitted that the respondent never asked for specific advice in writing from the appellants. The appellants merely responded to the borrower's urgent request for the use of the first OD and the proposal to create a LHC over the land as reflected in the borrower's letter to the respondent dated 29 August 1984 (Rekod Rayuan Jilid II at p 352), by giving the advice in their first letter, acting on the information gathered from the respondent's letter dated 23 August 1984. Though the letter of offer stated that the

utilization of the overdraft facility might be allowed only after the execution of all security documents and presentation of the charge for registration, the respondent had already disbursed RM200,000 to the borrower even before the appellants' advice had been sought. The contention of the respondent that the disbursement of RM200,000 was in respect of a temporary overdraft on a clean basis and only to be a part of the first OD if the charge was perfected, was inconsistent with the respondent's pleaded case and an afterthought. And in respect of the failure on the part of the respondent to produce the documentary evidence to prove that the borrower had applied for a temporary overdraft on a clean basis the court ought to have invoked the presumption under s 114(g) of the Evidence Act 1950 ('the Act') by drawing an adverse inference against the respondent, in the result that the evidence withheld must be held unfavourable to the respondent, that is to say, there was no such request from the borrower. Therefore, the absence of any request for advice from the appellants prior to that disbursement to the borrower shows an absence of causation between the alleged negligent act and the detriment.

(b) The learned judge found and concluded that the instructing letter from the respondent to the appellants dated 23 August 1984 was very clear, that is to say, the respondent wanted a third party first legal charge on the land; however, on the borrower's request for a LHC the appellants volunteered the advice that a LHC was sufficient security. The learned judge was correct in his findings and conclusion. In our view, the fact that the respondent never asked for specific advice in writing from the appellants does not absolve the appellants from liability for the negligent advice. In respect of the earlier release of RM200,000, the trial judge believed the respondent's witnesses who testified that the disbursement was to be treated as a separate facility on a clean basis and only to be part of the first OD, if the charge was perfected, and from his finding of facts he concluded that the appellants were not liable for that sum. We decline to interfere with his findings based on facts and credibility. Having regard to the evidence adduced and believed by the learned judge we are satisfied that the learned Judge was right in not invoking the adverse inference against the respondents under s 114(g) of the Act for the non-production of the said documentary evidence because, on the facts there is insufficient ground to warrant such presumption. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb without first considering whether in the circumstances of each particular case there are adequate grounds to justify any presumption being raised (per Ong J in *Mohamed Ali v Public Prosecutor* [1962] MLJ 230). Even if the presumption is to be applied, the appellants are still liable for the amount released to the borrower after the negligent advice was given. Although the learned judge did not place any emphasis on the real question of legal causation, on the facts, we are satisfied that the advice of the appellants that the LHC was sufficient security was a cause of the respondent disbursing the first OD and subsequently the second OD to the borrower to its detriment. Therefore, we do not agree that there was an absence of causation between the alleged negligent act and the detriment. However, there was an absence of causation in respect of the RM200,000 because the appellants' advice was not the cause of its release. Hence, the learned judge was justified and right to have concluded that although the appellants were not liable for the separate facility of RM200,000 granted on a clean basis before the matter was referred to the appellants, they were liable in negligence to the respondent for the loss suffered in respect of the entire sum on the first OD.

(3) (a) In respect of topic B, the learned counsel submitted that —

- (i) The learned judge was wrong when he came to the conclusion that the title had been deposited by a third party with the respondent for some other purpose (Rekod Rayuan Jilid I at p 157 at first paragraph) when in fact it can be regarded that the Title was deposited by the intended charger who was also the owner, as security for a loan irrespective of whether it was deposited for the creation of a third party first legal charge or a LHC. Further, he submitted that it is immaterial whether it was by way of a charge or a LHC since s 281 of the NLC does not distinguish between the form of the security.

- (ii) The respondent even agreed that if it felt that the creation of a LHC was insufficient to protect its interest, it ought to have either asked for additional securities or reject the loan outright (see the evidence of PW2 at pp 223–224 Rekod Rayuan Jilid I). By failing to do so, the respondent was in error.

- (iii) The learned judge in coming to the conclusion that the appellants were negligent was influenced by and relied on the decision of the Court of Appeal in *Perwira Habib Bank* and the law as laid down in s 281 of the NLC without considering the fact that even before the instructing letter was issued by the respondent to the appellants all the incidences of the sale and purchase of the land had been fulfilled including the payment of the full purchase price by the purchaser to the owner as evident from the memorandum of transfer executed by the owner in favour of the purchaser dated 21 July 1984. And in the result, based on decided cases, at the time when the title was handed over to the respondent and subsequently to the appellants, the owner was a bare trustee for the purchaser

A and had thus divested itself of all its rights, interest, title and benefit in and to the land. Consequently, the beneficial ownership in the land passed to the purchaser.

(iv) The respondent failed to enforce the LHC because of its own failure and neglect to plead and adduce in evidence B the fact that the consent of the State Authority for the transfer of the land had been obtained on 25 January 1988. Both the High Court in OS No S6–24–1278–1990 and the Court of Appeal in *Perwira Habib Bank* in the respective judgments found the lack of consent to be crucial. It was held that since there was the lack of consent, the beneficial C interest in the land had not passed to the purchaser, and as such, the purchaser did not have any right in equity to be passed to the respondent. The courts also decided on the basis that due to the lack of consent, the SPA must be treated to be at an end after the expiry of a reasonable time. Therefore, had the courts been appraised of the existence D of the consent surely the end result would have been different. Further, the respondent had not given any explanation before the learned trial judge on this omission. The solicitors/counsel for the respondent in the foreclosure proceedings should have been called to give evidence to E explain the omission and the respondent should have tendered a complete record of the foreclosure proceedings. Therefore, based on authorities, such failure must attract the invocation of s 114(g) of the Act. And further, the learned judge erred in refusing to allow the appellants to tender the appeal records of either the trial court or the F Court of Appeal in *Perwira Habib Bank*, (see Rekod Rayuan Jilid I at p 299) so that, in the light of PW3's evidence (see Rekod Rayuan Jilid I at pp 231–232), it would have been instructive to know the following matters, viz on what affidavit evidence the trial court dismissed the respondent's case, did the respondent sufficiently refer to G the issues of the payment of the purchase price and the consent of the State Authority at the trial court and was the respondent itself not negligent in canvassing the core issues in the originating summons, especially considering the fact that both the trial court and the Court of Appeal relied very H heavily on the fact of the consent of the State Authority not having been obtained which was certainly not true, and for that matter, the respondent's case in the Court of Appeal was predicated on the basis of the absence of the consent of the State Authority which again, factually, was not correct.

I (v) The learned judge erred in his finding that the SPA had been determined upon the expiry of the period for the payment of the balance of the purchase price since the consent of the State Authority had not been obtained. The finding was erroneous because no notice had been given by the owner to the purchaser to terminate the SPA and since the purchase price had been paid in full the time period for obtaining the consent of the State Authority could be extended by mutual agreement of the parties and that the said consent had in fact been obtained. Further, the learned judge failed to consider that the respondent was aware of these facts when it commenced the foreclosure proceedings. As the title had been deposited with the respondent for the purpose of a third party first legal charge on the land, it can be construed that the respondent knew or ought to have known who the owner of the land was at that time, yet, it was prepared to accept the title as security for the overdraft facilities.

(b) On the learned counsel's submission under sub-para (3)(a)(i), we are of the view, that by the expression 'for some other purpose' as contained in the relevant paragraph of the judgment, the learned judge was referring to the purpose of executing a third party first legal charge on the land for which the title was deposited by the purchaser with the respondent, though which may be good for that purpose but not possible for the respondent to be able to create a LHC in its favour because under s 281(1) of the NLC the right to grant a LHC over the land belongs only to the registered proprietor or lessee of the land. Although the section does not distinguish between the form of security, to our mind, the facts as to who deposited the title with the respondent and who consented to the creation of a LHC are material for the purpose of the section in order for a LHC to be valid. Therefore, the argument has no merits. In respect of sub-para (3)(a)(ii), we are of the view that despite the fact that the respondent did not ask for additional securities or did not reject the loan outright, the appellants cannot escape liability for the negligent advice on which the respondent had relied and acted to its detriment. With regard to sub-para (3)(a)(iii), we are satisfied that the learned judge was right in relying on the decision of the Court of Appeal in *Perwira Habib Bank* without the need to consider those incidences in concluding that the appellants were negligent. Notwithstanding that the owner was a bare trustee for the purchaser who had acquired the beneficial ownership in the land at the time when the title was handed over to the respondent by the purchaser, the facts are manifest that the purchaser was not the registered owner of the land at that point of time who had no right whatsoever to grant a LHC over the land under s 281 of the NLC. In the case of sub-para (3)(a)(iv), having scrutinized both the judgments of the trial court in the foreclosure proceedings and the Court of Appeal in *Perwira Habib Bank* we are unable to discover any passage or statement therein to indicate the revelation of the fact that the consent of the State Authority had been obtained on 25 January 1988. Premised on the assumption that the fact was not revealed in the foreclosure proceedings and in the proceeding before the Court of Appeal, we are of the view that had that revelation been made and appraised by the courts the end result would still be the same because the time limited for obtaining the consent had already expired on 15 June 1984 and therefore, the contingent term of the SPA had not been fulfilled and by reason of cl 2(a) of the SPA the agreement shall determine. Hence, the fact that the consent of the State Authority was obtained about four and a half years later would be of no consequence. Therefore, in our view, there was no need for the respondent to explain or call evidence to explain before the learned trial judge of its omission or to tender a complete record of the foreclosure proceedings. In fact, the appellants could have called the solicitors/counsel for the respondent in the foreclosure proceedings to be cross-examined but the appellants did not do so. Therefore, the non-invocation of the presumption under s 114(g) of the Act against the respondent by the learned judge was justified. And for the same reason the learned judge was justified in refusing to allow the appellants to tender the appeal records. Lastly, on sub-para (3)(a)(v), the learned judge was correct in concluding that the SPA had been determined upon the expiry of the period for the payment of the balance of the purchase price for lack of consent from the State Authority. It is trite law that the intention of the parties to the SPA must be gathered from the agreement itself. Nowhere in the SPA which requires the need of a notice to be given by the owner to the purchaser to terminate the SPA and which enables further extension of the time period for obtaining the consent of the State Authority to be given. The facts remain that the consent had not been obtained by the target date and there is no evidence that the owner had agreed to further extension at any time thereafter. Of course, the respondent must have been aware who the registered owner of the land was, as evident from its letter of 23 August 1984. However, the respondent at that point of time accepted the title from the purchaser only as security for the purpose of executing a third party first legal charge but not for the purpose of the creation of a LHC which was subsequently proposed by the borrower, endorsed by the appellants and accepted by the respondent. Therefore, the argument does not hold water.

(4) (a) On topic C, the learned counsel argued that the finding of the learned judge on negligence goes against the grain of the authorities. And further, the learned judge failed to consider the facts that the appellants had qualified their advice by staling that a LHC would only be sufficient security at that point in time, that is to say, pending the consent of the State Authority to be

obtained, that the appellants declined to make any representation as to the consent and that the respondent sought no clarification or detailed advice from the appellants.

(b) (i) The learned judge made the findings on facts as enumerated in para 3 above. In a nutshell, in the face of the specific instruction from the respondent to the appellants for the creation of a third party first legal charge in its favour and with the knowledge that the consent of the State Authority had not been obtained at that point of time, the appellants in their first letter advised the respondent that in the circumstances a LHC would be in order and would be sufficient security at that point in time for the disbursements of the funds and followed by their second letter advising the respondent to allow the borrower to utilize the first OD in the mistaken belief that they had secured a proper LHC. Before giving the advice, the appellants did not bother to check with the owner of whom the appellants were aware of, for its confirmation that it had indeed deposited the Title and that it had no objection to a LHC being created. To our mind, from the instructing letter of the respondent, it cannot be construed that the respondent had represented to the appellants that the Title had been deposited with the respondent by the owner. Even if we are wrong on this view, because of the nature of their profession the appellants were not entitled to presume from the letter that the owner had given its consent for the creation of a LHC on the land. Hence, this is the pitfall of the appellants, which led to the pronouncement by the courts that the LHC was invalid and therefore, unenforceable by reason of non-compliance with the requirements of s 281(1) of the NLC. They fell deeper into it when in their third letter the appellants advised the respondent that the respondent was properly secured for the facility of RM1.2m by the LHC which was tainted from its inception. Based on the authority of *Brisol & West Building Society v Mothew* [1966] 4 All ER 698 (per comment of Millett LJ), on the facts, the learned judge found that the appellants had been guilty of failing to give the respondent proper advice in respect of the LHC. The learned judge also found that the respondent had also shown what advice ought to have been given and that if the proper advice had been given it would not have released the funds. Therefore, the learned judge was satisfied that under both limbs as proposed by Millett LJ the appellants were negligent.

(ii) We agree with the learned judge on his findings and conclusion on negligence mainly based on facts, the admissions of the appellants' witness DW1 and credibility.

Therefore, we decline to interfere. To our mind, the failure of the learned judge to consider the facts advanced by the learned counsel is insignificant.

(5) (a) Under topic D, the learned counsel submitted that the learned judge erred in allowing PW4, a practising solicitor, to give purportedly expert evidence on the conveyancing practice, in particular relating to a LHC, despite objection, and in referring and relying on her evidence, as appeared to be, in coming to the conclusion as he did, although he did not consider her to be an expert. Such evidence was not admissible under s 45 of the Act and O 40 r 1(1) of the Rules of the High Court 1980.

(b) Be that as it may, the learned judge stated that he did not need an expert to assist the court because clearly, the obligations that rested on the appellants were no more than as stated in the provisions of the NLC and as found in decided cases. He held that the true test was the foresight of a reasonable man and not the hindsight of an expert and that whether the appellants had fallen foul of s 281 of the NLC, was the issue. He accepted and adopted the reasoning of Oliver J in *Midland Bank v Hett, Stubbs & Kemp (a firm)* [1979] ChD 384 to this case, and concluded that the appellants were negligent as they failed to get the confirmation from the owner that it had indeed deposited the Title and that It had no objection to a LHC being created. We agree with his conclusion since the extent of the legal duty of the appellants must, we think, be a question of law for the court. Further, it is incumbent on every practising solicitor in the conveyancing practice such as the appellants to know the law.

(6) (a) Lastly, on topic E, the learned counsel submitted that the basis of computing damages awarded by the learned judge is grossly erroneous. The leaned Judge ought to have taken all matters into consideration and awarded only nominal damages to the respondent. And further, the respondent failed to mitigate its loss as it chose to compromise on the other securities held by it, in that, it had accepted reduced sums from two of the guarantors on their liabilities.

(b) The learned judge awarded damages based on the second alternative as submitted by the respondent's counsel, that is to say, for the loss of the value of the security which was conceded to by the appellants' counsel, and the value of RM3.3m was based on the valuation report which was unchallenged. We agree with the learned judge as the basis of the award was conceded, the valuation was not challenged and the forced sale value of the Land was not proved by the appellants. Further, an award of nominal damages would not be justified as the respondent had proved more than on the balance of probabilities that there was causation between the negligent act and the detriment, that is to say, the negligent advice was the direct cause of the respondent

> disbursing the funds to its detriment for not being able to foreclose on the land. In respect of the learned counsel's submission on the failure of the respondent to mitigate its loss, we decline to consider because, with respect, he did not direct our attention to the relevant evidence in the appeal record to support his claim. What we manage to find out from the appeal record is only that judgment had been obtained by the respondent against the borrower and other defendants in that proceeding and that the fourth defendant had paid up a total sum of RM325,000 (see Rekod Rayuan Jilid I at pp 207–208). These facts are too vague to merit our consideration.

Therefore, we dismiss the appeal with costs to the respondent and the deposit to be paid towards taxed costs.

My learned brothers, Abdul Hamid Mohamad and Abdul Aziz Mohamad JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs.

Reported by Sivapragasam Kumaran